



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/623,489	07/18/2003	Josh Schreider	PA5311	4579
30448	7590	05/15/2007	EXAMINER	
AKERMAN SENTERFITT			THAKUR, VIREN A	
P.O. BOX 3188			ART UNIT	PAPER NUMBER
WEST PALM BEACH, FL 33402-3188			1761	
			MAIL DATE	DELIVERY MODE
			05/15/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/623,489

Applicant(s)

SCHREIDER, JOSH

Examiner

Viren Thakur

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 March 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. In light of the filing and approval of the terminal disclaimer filed, March 6, 2007, the rejection of claims 1-12 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-10, 13 and 14 of copending Application No. 10/642541 has been withdrawn.
2. As a result of the amendment, the rejection of claims 1-3 and 10-12 under 35 U.S.C. 112, second paragraph has been withdrawn.
3. As a result of the amendment, the rejection of claims 2-9 and 12 under 35 U.S.C. 112, second paragraph has been withdrawn.

Drawings

4. The Examiner suggests providing drawings that more clearly show the endpoints of the lines that correlate an item number to the actual item, as opposed to the photographs

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

Art Unit: 1761

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. **Claims 1-4, 8-12 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Coffee Cakes etc (web.archive.org/web/*/http://www.geocities.com/red6012002/coffee_cakes_etc.html) in view of Berry et al. (Classic Home Cooking, 1995).**

The references and rejection are taken as cited in the previous Office Action, mailed October 6, 2006.

8. **Claims 5-7 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Coffee Cakes etc. in view of Berry et al., as applied to claims 1-4 and 8-12, above, and in further view of Wetzel's Pretzels (www.wetzels.com/experience.php).**

The references and rejection are taken as cited in the previous Office Action, mailed October 6, 2006.

Response to Arguments

9. Applicant's arguments on page 11 of the remarks, that none of the references nor the combination teach or suggest a snack food having the configuration and composition of both a pretzel and a cinnamon bun has been fully considered but is not persuasive. Coffee Cakes etc., teaches both the composition of a cinnamon bun and the composition of a pretzel. Coffee Cakes etc., further teaches the shape as disclosed in instant claim 1 for the first dough member (Figure 5) and a spiral configuration for the second dough member (Figure 3). Both of these dough members, as taught by Coffee Cakes etc., have preselected compositions. Coffee Cakes etc, is silent in teaching wherein the second elongated dough member is positioned within a first of said plurality of open spaces of said first elongated dough member. Applicant further argues that Coffee Cakes etc., teaches baking Danish or sweet dough in the shape of a pretzel. Although this is true, the Examiner further asserts that Coffee Cakes, etc also teaches different shapes such as the spiral configurations for dough products (Figure 3). Berry et al. is relied on to teach that is has been well known to one having ordinary skill in the art to provide two different dough compositions wherein one of the dough compositions is positioned over the other dough compositions. In the case of Berry et al., hot cross buns are taught wherein the crossing dough members are made of short crust pastry, which is different from the dough composition of the bun itself. As a result, the food product of Berry et al., would have provided an organoleptic food product comprising multiple flavors. Thus, Berry et al. broadly teach the concept of combining two different dough compositions in a food product combination. Therefore, it would have been obvious to one having ordinary skill in the art to combine two different dough compositions for the purpose of providing a multiple flavored food product combination. The Examiner asserts that Berry et al. is relied on to teach the

concept of placing a first dough member onto a second dough member and given this teaching it would have been obvious to one having ordinary skill in the art to combine the first and second dough members of Coffee Cakes for the purpose of providing a multi-flavored food product.

Further on page 11, Applicant disagrees with the Examiner's assertion that Wetzel's Pretzels provides evidence that there exists a pretzel that further comprises a cinnamon bun." The Examiner further asserts that Wetzel's Pretzels is relied on to teach a cinnamon bun composition in a shape other than that of a cinnamon bun. Both a cinnamon bun formed into the commonly known spiral cinnamon bun shape and Wetzel's cinnamon roll in the shape of a pretzel start as elongated dough members. In this case, it would have been obvious to one having ordinary skill in the art that the cinnamon roll and the cinnamon bun can wholly have the same composition. Therefore the major different between Wetzel's cinnamon roll pretzel and the "common cinnamon bun" is the shape into which the elongated dough member is formed. Such a change in shape would have been considered a change in shape that would not have imparted a patentable distinction over the prior art. Nevertheless, Coffee Cakes etc., also teaches elongated dough members that have a spiral configuration used for making cinnamon buns therefore the prior art as a whole also teaches that cinnamon bun dough compositions have been known to take different shapes. In addition, the references cited below, which were not relied upon also provide evidence of food product combinations comprising multiple components that take various shapes.

Regarding Applicant's arguments on page 11 that none of the references teach or suggest a food item that has a first dough member formed to define three spaces with another dough member formed into a spiral and positioned within one of the spaces defined by the first dough member, the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references

themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Coffee Cakes etc., is relied on to teach a first dough member having a plurality of open spaces and further comprising three spaces. Coffee Cakes etc., further teaches another dough member having a spiral shape. Berry et al., is relied on to teach combining two different dough compositions, as discussed above. The Examiner further asserts that whether the second dough member had a spiral shape or any other shape would not have provided additional functionality to the food product and as a result is considered an aesthetic design change (See MPEP 2144.04 I). Additionally, the arrangement of the spiral shaped dough member would also have not imparted patentability to the food product since, its location on the first dough member would also have been a matter of ornamentation: a food product with a cinnamon bun on top of a pretzel stick would not have been any different than a food product with a cinnamon bun placed within an opening of a pretzel. Furthermore, regarding the plurality of openings in the first dough member, the Examiner asserts that the food product combination as claimed could not have a first dough member comprising a plurality of openings since a second, third and fourth spiral shaped dough members are placed into the openings. Therefore, the first dough member *of the food product combination* would not have any openings when the product is considered as a whole. By placing the second, third and fourth dough members into the first dough member, any of the recited openings would have been closed and thus the finished product would not have had a first dough member with a plurality of openings. Therefore, this provides further indication that the physical placement of the second dough member would not have provided a patentable feature over the prior art.

Regarding Applicant's arguments on page 12 that none of the cited references, nor the combination thereof provide any motivation for or suggestion to make a food product having "a first elongated dough member having a first preselected composition and formed to have a plurality of open spaces within

Art Unit: 1761

said first elongated dough member...a second elongated dough member having a second preselected composition and formed into a spiral configuration and positioned within a first of said plurality of open spaces of said first elongated dough member..." as recited in independent claims 1, 10 and 11. Again, the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Regarding the snack food having the configuration and composition of both a pretzel and a cinnamon bun, the Examiner asserts that the *configuration* of both a pretzel and, as claimed, "a second dough member is a cinnamon bun dough composition", does not limit the shape of the second dough member to a cinnamon bun. The claims only recite having a spiral configuration and cinnamon bun dough composition. Furthermore, having a configuration of a cinnamon bun would be different from having a spiral configuration. Having the configuration of a cinnamon bun can also encompass dough members having the cinnamon bun composition but in a twist shape as opposed to a spiral shape. In light of this, Wetzel's Pretzels teaches a dough member having a cinnamon bun dough composition and further teach that the dough member can be shaped in orientations different than the spiral taught by Coffee Cakes etc. As disclosed by the claims, the cinnamon bun mentioned by Applicant, is only disclosed as by the spiraled configuration of the second elongated dough member. Thus, the cinnamon bun is merely a change in shape of the elongated dough member into a spiral configuration. This would not be any different than the elongated dough member being formed into any other shape, provided that the dough member has a cinnamon bun dough composition. Therefore, it is not seen how this would provide a patentable distinction over the prior art, which teaches a cinnamon bun dough composition which is formed into a different shape. Regardless, the

Art Unit: 1761

Examiner asserts that Coffee Cakes etc., still teach cinnamon bun dough compositions in a spiral configuration. This provides further support that the shape of the cinnamon bun dough composition would not have provided a patentable feature over the prior art.

Applicant further argues on page 12, that even when combined, these references do not provide any motivation or suggestion to make a snack food having the configuration and composition of both a pretzel and a cinnamon bun. These arguments have been fully considered but are not deemed persuasive. It is noted that the features upon which applicant relies (i.e., configuration of both a pretzel and a cinnamon bun) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). The claims only recite having a cinnamon bun dough composition and not the configuration of a cinnamon bun. Nevertheless, a pretzel can have many configurations and a cinnamon bun configuration also encompasses elongated dough members formed into shapes other than a spiral shape, as discussed above.

10. The declaration under 37 CFR 1.132 filed March 6, 2007 is insufficient to overcome the rejection of claims 1-12 based upon the rejection under 35 U.S.C. over Coffee Cakes etc., Berry et al., and Wetzel's Pretzels as set forth in the last Office action because: the evidence provided by Applicant has not established a nexus between the invention and the declared commercial success. The declaration is not convincing in showing that only the limitations *as claimed* has resulted in the commercial success of the product and is not due to unclaimed features or practices, such as marketing. The declaration has not provided convincing evidence regarding the amount of sales versus the costs of the product or to whom the claimed invention was sold or the replacement of a

competing commercial product. The Examiner notes that these are not recommendations for what evidence to submit with a declaration.

Conclusion

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

US 2463112 discloses in Figure 24 a food product combination comprising two different dough products. It is further disclosed to form two-part crullers which are then united at the discharge outlets. Thus, US 2463112 discloses two elongated dough members having two different compositions which are combined to form a food product combination.

D426368 discloses a pretzel and thus pretzel dough having an opening and also having a spiral configuration. D317372 shows a first food product comprising an opening into which a second cereal is placed. D291470 discloses a pet food biscuit comprising two components wherein a second component is placed into a first component.

D258320 discloses a pretzel comprising two different elongated dough members wherein each dough member would have had a preselected composition.

D428236 discloses baked products of elongated members wherein the members are shown to take different shapes.

D393735 discloses two elongated dough members

US 4857333 discloses a pet food of a first composition having openings into which a medicine is added.

US 3767338 discloses an apparatus for forming twisted products wherein the two components can be two different dough products.

US 4835000 discloses forming an extruded product comprised of two different dough compositions.

US 4445835 discloses marbleized dough pieces and thus discloses the combination of two different dough compositions into a food product.

US 3372654 discloses two dough compositions that can be formed into a shaped food product (Figure 5 and Column 2, Lines 38-45).

US 6106880 discloses rolling two different types of food products together. In essence, the first food product has openings into which a second food product is rolled.

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur
Examiner
Art Unit: 1761



KEITH HENDRICKS
PRIMARY EXAMINER